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Supreme Court, U.S.
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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JOSHUA J. PRATCHARD
LANCE CORPORAL, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces*

PETITION FOR A WRIT OF CERTIORARI

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Article 10 of the Uniform Code of Military Justice (UCMJ) states that if a service member "is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Due to the unreasonable delay in his case, Petitioner made a motion to dismiss under Article 10, UCMJ. The military judge denied the motion. After his conviction, Petitioner appealed the military judge's ruling to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Exercising its wide discretion to review both facts and law, the NMCCA held that the issue was waived by Petitioner's unconditional guilty pleas. But the NMCCA then stated, in dicta, that even if the issue was not waived, an Article 10, UCMJ, violation did not exist. Upon further appeal, the Court of Appeals for the Armed Forces (CAAF), exercising its limited jurisdiction, overturned NMCCA's decision and held that Petitioner did not waive his right to appeal the Article 10, UCMJ, issue. But then the CAAF conducted its own *de novo* review and held that an Article 10, UCMJ, violation did not exist.

QUESTION PRESENTED

Does Article 67, UCMJ, give the Court of Appeals for the Armed Forces jurisdiction to review a factual and legal issue *de novo* after it overturns a service court's holding that a review on the issue was waived and if a factual and legal review of the issue has not been properly conducted by that service court?

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*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces*

PETITION FOR A WRIT OF CERTIORARI

Lance Corporal Joshua J. Pratchard, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on June 15, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces is published at 61 M.J. 279 (C.A.A.F. 2005). App. A, *infra*, at 1a. The opinion of the Navy-Marine Corps Court of Criminal Appeals, is at No. 200301258, slip op. (N-M. Ct. Crim. App. May 18, 2004). App. B, *infra*, at 2a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on June 15, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISIONS

The pertinent portion of Art. I, § 8 reads:

The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

The Fifth Amendment to the Constitution reads, in part:

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS

10 U.S.C. § 810 reads, in part:

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

10 U.S.C. § 866(c) states:

In a case referred to it, the Court of Criminal

Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C. § 867 (c) reads, in part:

In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals . . . The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

STATEMENT OF THE CASE

Petitioner was tried before a general court-martial composed of a military judge alone on March 20, 2002. Pursuant to his pleas, Appellant was convicted of wrongful use of a controlled substance and wrongful distribution of a controlled substance in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

Petitioner was sentenced to confinement for three years, a reduction in rank to the lowest enlisted pay grade, forfeiture of all pay and allowances, and to be discharged from the

military with a bad-conduct discharge. The commanding officer authorized to convene the general court-martial (the convening authority) approved the sentence, but suspended all confinement in excess of thirty months pursuant to a pretrial agreement. Except for the bad-conduct discharge and the confinement in excess of thirty months, the sentence was ordered executed.

On May 18, 2004, the NMCCA affirmed the findings and sentence as approved by the convening authority. *United States v. Pratchard*, No. 200301258 slip op. (N-M. Ct. Crim. App. May 18, 2004). The CAAF exercised its discretionary jurisdiction to consider Petitioner's appeal, and held that the NMCCA had erred when it determined that Petitioner had waived his right to appeal the Government's violation of his speedy trial rights under Article 10, UCMJ. But then the CAAF reviewed Petitioner's Article 10 issue *de novo* and affirmed NMCCA's decision. *United States v. Pratchard*, 61 M.J. 279 (C.A.A.F. 2005).

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests that this Court grant his petition and either summarily reverse his case or set it for briefing and argument.

Although the CAAF overruled the NMCCA's holding that Petitioner had waived his right to a speedy trial appeal under Article 10, UCMJ, it then erroneously reviewed Petitioner's case *de novo* without first remanding it back to the service court for a proper review under Article 66, UCMJ. Under its powers pursuant to Article 67(c), UCMJ, the CAAF is a court of limited jurisdiction and it cannot review Petitioner's case unless the case has first been properly reviewed by one of the service courts of criminal appeals. While the service court

stated, in dicta, that there had not been an Article 10, UCMJ violation, that finding was compromised by its controlling opinion that an Article 10, UCMJ, appeal was waived. Therefore, the CAAF did not have a valid jurisdiction on which to base its *de novo* review.

Thus, the rights of service members are whittled away because their cases fall short of the intended comprehensive review under Article 66(c), UCMJ. This Court's review is therefore warranted.

ARGUMENT

After determining that Petitioner did not waive his speedy trial appeal under Article 10, UCMJ, the Court of Appeals for the Armed Forces exceeded its jurisdictional power by deciding Petitioner's case *de novo*; the court should have remanded Petitioner's case back to the Navy-Marine Corps Court of Criminal Appeals so that it could determine if there was an Article 10, UCMJ, violation.

The jurisdictional power of review that service courts possess under Article 66(c), UCMJ, is an "awesome, plenary, *de novo* power of review" that allows a service court to substitute its judgment for that of the military judge and court members. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The CAAF has stated that, "A clearer *carte blanche* to do justice would be difficult to express." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991). This great power was legislated by Congress in order to combat the prevailing unlawful command influence and excessive sentences that existed in the military. See, e.g., *Hearings on H.R. 2498*

Before the Subcomm. Of the House Armed Services Comm. On the Uniform Code of Military Justice, 81st Cong., 1st Sess. 597 (1949); Roger M. Currier & Irvin M. Kent, *The Boards of Review of the Armed Forces*, 6 VAND. L. REV. 241-242 (1952-1953).

In contrast, Article 67, UCMJ, which curtails the CAAF to "matters of law", limits the jurisdictional power of review that the CAAF possesses. This Court has recognized the limited power of the CAAF under statute. See *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (reversing the CAAF for exceeding its jurisdictional power). The CAAF itself has recognized its limitations. See, e.g., *United States v. Sanders*, 37 M.J. 116 (C.M.A. 1993) (recognizing that it had no authority to assess the credibility of witnesses).

Thus, on appeal, a service member's best chance for review of all factual and legal evidence is at the service court level, due to their immense power of review. Petitioner's case was reviewed by the NMCCA under Article 66, UCMJ, and the court determined that Petitioner had waived his right to appeal a speedy trial issue under Article 10, UCMJ. *Pratchard*, No. 200301258, slip op. at 2. But in the next paragraph of its decision, the NMCCA, in dicta, stated that "even if" the issue was not waived, there was no Article 10, UCMJ violation. *Id.* It is upon this "even if" dicta that the CAAF can claim its jurisdiction to review Petitioner's case *de novo*.

Without the NMCCA dicta, the CAAF would not have had a basis on which to further review Petitioner's case after it answered the question of whether the Article 10, UCMJ, speedy trial issue was waived. However, such a basis, based on dicta, is not enough under this Court's interpretation of the CAAF's jurisdictional powers. In *Clinton v. Goldsmith*, this Court relied upon the black letter law of Article 67, UCMJ,

when it determined that the CAAF did not have jurisdiction to act on a case. *Clinton*, 526 U.S. at 534. Applying this straightforward analysis to Petitioner's case, the CAAF could only act on cases "as affirmed" by the NMCCA. See Art. 66(c), UCMJ. Petitioner's case "as affirmed" by NMCCA held that he had waived his right to appeal an Article 10, UCMJ, speedy trial violation. Therefore, when the CAAF overturned the NMCCA's decision, the CAAF no longer had a case to review "as affirmed."

Also, a reliance on dicta circumvents the full review that Article 66(c) envisions for a service member. For example, although the NMCCA found, in dicta, that an Article 10 violation did not occur, a contrary finding, asserting a violation, would have been detrimental given that the NMCCA had already held that the issue was waived. Such a finding would have needlessly characterized the NMCCA to be impotent, despite its broad powers, in the face of an Article 10 speedy trial violation.

After the CAAF held that Article 10 could not be waived, the CAAF should have remanded the case to the NMCCA, which was unshackled by its prior erroneous holding, and in a position to conduct a proper Article 66(c) review regarding the Article 10, UCMJ, speedy trial issue.

CONCLUSION

Wherefore, the Petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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